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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 669

MUNICIPAL DISTRIBUTOR GROUP, *Petitioner*

v.

FEDERAL POWER COMMISSION, ET AL.

REPLY BRIEF OF PETITIONER TO BRIEFS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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I

The Federal Power Commission argues (FPC Br. in Opp., pp. 14-15) that unless it is authorized to revise retroactively (presumably upward) the just and reasonable rates affirmed by the court below (which would deprive the consumers of the refund of $375,000,000, representing excessive charges unlawfully exacted by the producers), the producers may not have the ability to provide the capital for exploration and development to alleviate "a potential crisis in the adequacy of sup-

plies of natural gas for millions of consumers"[1] (FPC Br. in Opp., pp. 14-15).

There is not a shred of evidence to support the Commission's argument, and the Commission cites none. The refunds of $375 million are a "drop in the bucket" to producers who annually spend some $4 to $5 billion[2] on exploration and development and have enormous cash resources.[3]

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[1] Assuming, *arguendo*, that there is a shortage of natural gas, it is important that the Court not be misled as to its nature. The "shortage" does not affect existing commitments to consumers. There is no "shortage" to meet such existing commitments. The "shortage" refers to new increments of gas (see *Charting The Regulatory Course*, Remarks of John N. Nassikas, Chairman, Federal Power Commission, before New England Gas Association, March 19, 1970, p. 2), to meet an unexpected and explosive recent demand for natural gas, primarily industrial, as a result of air pollution and other environmental considerations. The demand for natural gas has been aggravated by the shortage of other fuels such as low sulphur oil and coal that are suitable for environmental purposes. The "shortage" assumes all demands should be served by natural gas, disregarding the question of the economically wasteful use of natural gas and efficient allocation of the Nation's energy resources, including natural gas, in the Nation's best interest. Any number of reasons may account for the "shortage" which has no relationship to the rate orders affirmed by the court below and the Commission's regulatory policies in general (see Municipal Distribution Group's Br. in Opp. in Nos. 680, et al., pp. 17-20).

[2] Commission Staff Exhibit 11, Schedule 27, FPC Docket No. AR69-1.

[3] Published financial data show enormous cash and equivalent reserves for the major producers. For example: Amerada Petroleum Corp., $148,000,000; Atlantic Richfield Co., $215,000,000; Cities Service Co., $113,000,000; Continental Oil Co., $268,000,000; Getty Oil Company, $106,000,000; Gulf Oil Corporation, $553,000,000; Mobil Oil Corporation, $728,000,000; Occidental Petroleum Corp., $288,000,000; Phillips Petroleum Co., $187,00,000; Shell Oil Company, $288,000,000; Standard Oil Company of New Jersey, $1,276,000,000; Superior Oil Co., $438,000,000; and Texaco Inc., $401,000,000.

The Commission's arguments to this Court are at odds with its representations to the court below where it said (FPC Br., CA 5, Nos. 27492, et al., pp. 20-21, 25, 26, 27, 28, 29):

> . . . the only price fixed by the Commission that can have any substantial effect on the development of *new* supplies is the price for gas-well gas not yet found and committed to the interstate market, that is, the third-vintage price for future sales of gas-well gas. . . .
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> * * * * *
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> The producers' argument that in order to alleviate the alleged gas shortage the Commission should fix the prices for all gas (including oil-well gas) above pre-existing prices totally ignores the fact, as found by the Commission and the courts in *Permian* and the Commission here, that the only prices fixed by the Commission that can have any substantial effect in the development of *new* supplies is the price for gas-well gas not yet found and committed to the interstate market.
>
> . . . the producers have simply disregarded the basic economic basis for the multiple-price system adopted in *Permian* . . . .
>
> * * * *
>
> The producers attempt (e.g., Amerada Br. pp. 19, 24) to avoid the impact of this economic reality on the ground that any reductions and refunds ordered will allegedly impair the search for additional gas supplies because the producers' source of funds for reinvestment would be less than if there were no reductions or refunds. As the Commission stated in denying rehearing (R 309077), this claim, which is based on the invalid premise the producers must internally generate all investment funds, is essentially the same contention in favor of a single price for all gas previously made and rejected in *Permian*. . . . The Commission properly

concluded (R 309077) that, assuming the rate set for future dedications is adequate, the industry will have no difficulty in finding the funds required to do the task.

Even assuming the premise that revenues for current exploration and development must be internally generated by sales of *gas* —not even from company funds generally, this would not justify maintaining the excess rates now being charged unless the rates set by the Commission for all gas, viewed together, were inadequate to generate a substantial cash flow. For the prices allowed by the Commission for first and second vintage gas provide plentiful revenues for investment in the search for new gas-well gas wells. . . .

Moreover, while producers repeatedly assert that the Commission's order will reduce revenues by $70 million annually, the fact is that because of the increase in sales volumes the total revenues generated by Southern Louisiana sales for 1969 *at the rates prescribed by the Commission* should be from about $22 million to $36 million greater than the actual revenues generated for 1968. . . .

Equally important, revenues from other company sources can and will be invested in the search for gas if the price is right. Moreover, in the past newcomers have put money into exploration and development and debt capital has also been used by producers.

Plainly, so long as the price for new gas is high enough to compete with alternative uses of available funds and so long as the gas market continues to grow, one may confidently expect necessary funds to continue to flow to new gas exploration and development. If the price for new gas were not high enough, there would be no basis for assuming that extra allowances for flowing gas would be invested in new gas rather than other activities.

> The foregoing makes it apparent that the allegations that the Commission prices are insufficient to bring forth adequate gas supplies, even if shown to be valid, would only warrant changing the price for future gas supplies. This is the very question the Commission is studying in the new offshore proceeding it has commenced, during which producers will be allowed to charge, subject to refund, one and one-half cents *above* the third-vintage price (which is already 2 cents above the calculated current cost).
>
> Far from demonstrating the invalidity of the present decision, the new proceeding constitutes the proper manner in which to consider possible revisions of the established rates. . . . (italics the Commission's; footnotes omitted)

The Commission now mistakenly assumes that if the refunds were forgiven, the producers necessarily would use the money to explore and develop natural gas reserves. But the irrefutable fact is that the producers have had unrestricted use of these refund dollars in their corporate affairs; yet, there is "a potential crisis in the adequacy of supplies of natural gas" (FPC Br. in Opp., p. 14). By their own admission, the producers have directed such funds where the expectation of profits is greatest.

It is difficult to escape the conclusion that the Commission has attempted to use the "shortage" to distract attention from, and preclude consideration of, the merits of the questions presented by petitioner in its petition for a writ of certiorari.

II

It is clear that the Commission's argument that the general equitable powers of the court support the order

below is misplaced. The Natural Gas Act permits a reviewing court only "to affirm, modify or set aside" the order before it for review. Any equity powers possessed by the court are ancillary to such authority, not in substitution for it. Neither the court below, nor the Commission, nor any of the respondents cite any precedent to support their arguments. We know of none. Although the court below expressed concern over what it characterized as "new evidence of a possible impending gas supply shortage" which had emerged after the closing of the record by the Commission in Southern Louisiana I, it nevertheless rejected proposals by the Commission and some producers that the matter be remanded for the taking of further evidence. After careful consideration it entered a judgment affirming the order and dissolving the stay of the Commission order which it had previously ordered. The court, *after* referring to its equitable powers as authorizing the Commission to make "retrospective as well as prospective adjustments", emphasized that "our judgment is an affirmance and not a remand" (Pet. App. B, p. 2) and the judgment entered by the court leaves no doubt respecting the unqualified and unconditional nature of the affirmance (Pet. App. E, p. 1).

In an effort to make it appear that the ruling of the court below respecting its equitable powers was within the scope of Section 19(b), the Commission quotes (FPC Br. in Opp., p. 17) Section 19(b) as providing that the reviewing court may order additional evidence to be taken before the Commission. The quotation omits essential language and is misleading. The omitted language discloses that such additional evidence may be ordered only "(i)f any party shall apply to the court for leave to adduce additional evidence,

and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission." (Pet. App. C, pp. 4-5) Such evidence, moreover, is to be adduced in advance of court review.

The Commission omits to inform this Court that motions to adduce were filed in the court below by the producers and pipeline companies and were denied, *sub silentio*, by the court below. No order to take additional evidence was entered. Review proceeded and upon review, the Commission's orders were affirmed without any directions to the Commission to take further evidence.

It is ironic to have the Commission rely on *Natural Gas Pipeline Company* v. *Federal Power Commission*, 128 F. 2d 481 (CA 7, 1942) as supporting the ruling of the court below. In that case the construction of Section 19(b) as conferring equitable powers was announced in the context of "the duty of a court of equity to exercise jurisdiction to enforce restitution, and, so far as possible, to correct what has been wrongfully done." (128 F. 2d at 486). Here the Commission and court below would reverse that salutary principle and reward the wrongdoers.

CONCLUSION

The petition for a writ of certiorari should be granted and the judgment of the court below on the questions presented should be reversed without further briefs or argument, since the decision of the court below on these questions is so clearly contrary to, and in con-

flict with, the Natural Gas Act and decisions of this Court and circuit courts of appeals.

Respectfully submitted,

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